(10)

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1252

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

v.

MRS. G. J. RILEY, ADMINISTRATRIX,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

S. P. JONES,
FRANKLIN JONES,
C. A. BRIAN,
ERNEST F. SMITH,
Marshall, Texas.
B. F. WHITWORTH,
Linden, Texas,
Attorneys for Respondent.

WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Central-4091

TOPICAL INDEX

List of Authorities

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No.....

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

v.

MRS. G. J. RILEY, ADMINISTRATRIX,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

GENERAL STATEMENT

Respondent contends that the only question involved is whether there was sufficient evidence to justify the jury finding that (a) Riley's death was proximately caused, in whole or in part, by other employees than Riley negligently cutting or weakening the stakes on the car to such extent as to cause the entire load of piling to give way when Riley cut the first wire, at the West end of the car; or (b) that Riley's death was proximately caused, in whole or in part, by the petitioner having negligently failed to furnish him a reasonably safe place to work. The testimony produced showed, or certainly raised the issue, that petitioner negligently caused Riley's death; and petitioner's failure to produce its foreman as a witness and have him explain or refute its effect, was equivalent to admitting its liability.

By not offering any testimony as to liability, petitioner admitted as true all that was introduced by the respondent, with all the presumptions and inferences that could be drawn from it, aided by petitioner's failure to produce its foreman, Walters, who was in charge of all of the work, and helped cut or saw some of the stakes (R. 111 and 115); probably the one that first gave way and caused Riley's death, and have him testify concerning the matters about which respondent had offered strong testimony against him; especially in view of the fact that the foreman had helped cut one stake at the West end of the car (R. 111), and had directed and controlled the depth or extent to which it was cut or weakened (R. 115); and then went up on the car with Riley (R. 97, at top), from which, and the failure of the foreman to testify, the jury had the right to infer that he counseled with Riley; and probably assured him that everything was safe and ready for him to cut the wire; and then jumped off of the car before Riley cut it.

The Court of Civil Appeals and the Supreme Court of Texas having adopted the jury findings of negligence on the part of petitioner in cutting or weakening the stakes to such extent as to cause them to prematurely give way and the load of piling to collapse, scatter and kill Riley; and also, the jury finding of negligence in failing to furnish Riley a reasonably safe place to work, the petition for certiorari should be denied; for it has not been, and can not be made to clearly appear, that palpable error was committed in affirming the judgment of the trial court.

STATEMENT OF THE EVIDENCE

(The name sometimes spelled Waters and sometimes Walters refers to the same person—the foreman.)

The following testimony, given by witnesses in person before the jury was sufficient to sustain, if indeed it did not compel, the jury finding that Riley's death was proximately caused in whole or in part (a) by other employees than him having negligently cut or weakened the stakes to such extent as that they prematurely broke and caused the load of piling to collapse and kill him; or (b) by the petitioner having negligently failed to furnish him a reasonably safe place to work.

The witness, Griffin, having testified (R. 66-67) that he had been with the gang for about one and one-half years at the time Riley was killed, which was December 19, 1942, further testified (R. 72, line 25 to line 11, page 73) that there were 54 piling on the car that they were unloading, and that during all of the time he had worked on the job, that the average cars unloaded at bridges was from 30 to 40 piling per car; that he had never seen a car with as many piling on it as the one they were unloading when Riley was killed. And (R. 73, lines 19-20), that the gang was under the control and supervision of Mr. Walters. And (R. 74, lines 7 and 8), that all of the gang worked under Walters' instructions.

Griffin testified (R. 74, beginning with line 14), that they had cut the stakes on the south side of the car, and on through line 20 that they were all taken out except one at each end, and that they were partially cut in two.

Griffin testified (R. 76, line 27), that on previous occasions when the cars being unloaded had 30 to 40 piling on them, the end stakes were cut as on the occasion when Riley was killed, and the others were removed.

Griffin testified (R. 85, near bottom, and top of page 86), on cross-examination that they were following the custom and practice that the gang had theretofore followed in the work of unloading cars of piling, and did not deviate from that custom and practice in unloading the car when Riley was killed.

Griffin testified also (R. 89, lines 18-25), that Walters climbed up on the piling car, and that Walters and Riley were both standing on the deck of the car at the West end of the piling before the wire was cut.

R. 94, near bottom of page, and at top of page 95, the witness Griffin testified that the load of piling would be controlled by the depth or extent to which the end stakes were cut, and that this could be controlled by the parties handling the axe or cutting device on the stakes, and that the foreman, Walters, was in charge of all that work, cutting and everything, on the occasion of Riley's death, and had the power to control the extent or depth to which the stakes would be notched. That Walters was in charge of the gang and all of the work, including notching of the stakes.

Griffin also testified (R. 95) that prior to unloading the car that caused Riley's death he had never seen a car where the piling fell off before they cut the last wire.

Griffin testified (R. 97, beginning at top of page), that Walters, the foreman, and Riley crawled up on the end

of the car before Riley cut the wire, and that before the wire was cut, Walters jumped off and was on the ground instead of standing on the end of the car—that he did get up on the end of the car before Riley got up there.

R. 99, the witness R. E. Nelson testified, with reference to Riley:

"Q. He didn't actually do any of the stake cutting, or did he?

"A. No, he didn't do any of that that I saw."

The witness, R. E. Nelson testified (R. 103, near bottom) that he saw the foreman Walters, and Walter Byles, and that they were notching the stake on the West end of the car with a cross-cut saw.

R. E. Nelson testified (R. 106) that they had weakened the stakes as they customarily weakened them.

NOTE: It is believed that such testimony of this witness and similar testimony of other witnesses, justified the jury finding that they weakened the stakes to the same extent as they had theretofore weakened the stakes on cars that carried only 30 to 40 piling. If the petitioner doubted that those words meant it was to the same depth as on the other occasions when they were unloading the cars with only 30 to 40 piling, it could have easily pursued the matter with the testimony of its foreman, the only living man who, it appears, could have testified about it, for it had foreclosed Riley's ability to do so, by killing him.

R. E. Nelson also testified (R. 108) to the effect that he had never theretofore seen a load of piling unload or

break through and fall off when the first wire was cut. Also, R. 108, near bottom, that the extent of notching would determine when the stake would break. Also, R. 108, at bottom:

> "Q. On this particular occasion do you know whether or not the stakes at the West end broke first, or the stake at the other end of the car?
>
> "A. The West end broke first."

The witness, Van Martin, testified (R. 111) that Walters was in charge of the work, and that he saw Walters and Mr. Byles cutting a stake on the West end of the car.

R. 115, near middle of the page, Walter Byles testified that he helped Walters cut one stake half in two, and that he had never cut a stake before, and he did not have any idea how it should be cut. That Walters said "we would saw it about half in two." That Walters decided and told him when it was time to stop. This witness testified (R. 116) with reference to the sawing and cutting of the wire, as follows:

> "Q. How long after that was it before Mr. Riley cut the wire?
>
> "A. Just as quick as he could climb up there and cut it."

After testifying that he had never seen a car with as many piling on it as the one that was being unloaded when Riley was killed, Griffin further testified (R. 73, near center of page), that when the train was brought in with the piling, the conductor said to the gang, in the presence of the foreman, that if they got it unloaded they

would have to hurry, there was a passenger train right on it. Other witnesses so testified.

We believe it is quite clear that the testimony we have presented and referred to shows that the jury findings are amply sustained. But, we feel it is our duty to call to the court's attention the following parts of the petition for certiorari.

ERRONEOUS STATEMENTS OF THE TESTIMONY RELIED UPON IN THE PETITION

On page 2 of the petition, it says:

> "Such fully developed and uncontroverted evidence shows that Riley was the most experienced member of the bridge and building gang." (Citing pages relied upon: R. 86, 105, 114-5, 118.)

An examination of the cited pages discloses that the witness Griffin (R. 86) merely said that he was just "as much" (experienced) as any of them.

The witness, Nelson (R. 105), answered the query that he didn't know about that. The witness, Martin, who had been on the job little, if any, more than a month (R. 110), said (R. 113-4), that Riley "knowed more about it than any of us." The other witness, Byles, who had been with the gang for two and a half weeks, testified (R. 118), in answer to questioning:

> "Q. * * * Mr. Riley was taking the lead unloading that car?
>
> "A. He cut those wires.
>
> "Q. Wasn't he taking the lead unloading it?
>
> "A. I don't know.
>
> "Q. Mr. Riley acted like an experienced man?
>
> "A. He just went and cut that wire, is all I know."

And the witness, Van Martin testified further about Walters (R. 114):

"* * * They say he had been with the company a long time.

"Q. Who had the actual charge of the work, Mr. Riley or Mr. Walters?

"A. Well, Mr. Walters was scratch boss."

SUMMARY OF ARGUMENT

I.

Respondent ignores petitioner's complaint that the verdict is excessive, because it is plainly a question of fact, and this court will not heed the invitation for it to get into the jury box and usurp its functions. We call attention, however, to the fact that this contention is fully and satisfactorily answered in that part of our brief in the Court of Civil Appeals in Texas, printed pages 109 to 115 inclusive, appendix to petitioner's brief in support of its petition for writ of certiorari.

II.

From the time the car of piling was loaded until the stake at the Southwest corner of the car prematurely gave way, causing the immense load to spread and break the stake and the wire at the other end, and all of the stakes on the North side of the car, which caused Riley's death, the car, the piling and the men who had anything to do with unloading it were in the exclusive control, and under the exclusive management of the petitioner.

III.

It is obvious that the stake at the Southwest corner of the car prematurely broke, because it had been weakened too much for it to hold, as was intended, against the time when the wire at the other end of the car could be cut; which would have let the two stakes on the South side of the car give way, and the piling roll off on that side, without causing a scrambling collapse of the load; or, interfering with the stakes on the other side.

AUTHORITIES

Hattie Mae Tiller, Exr. of Estate of John Lewis Tiller, Petitioner v. Atlantic Coast Line R. Co., 89 U. S. L. Ed., Adv. Op. No. 6, 403;

Mary Tennant, Admx. of Estate of Harold C. Tennant, Deceased, Petitioner v. Peoria & Pekin Union R. Co., 88 U. S. L. Ed., Adv. Op. No. 6, 326;

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610 (first reversal).

We believe that the law is so clearly settled by these very recent opinions of this court that we should refrain from citing additional authorities to sustain the judgment of the lower court in the Riley case, in which it appears to us that any reasonable consideration of the testimony leads to the inevitable conclusion that the jury findings of fact are abundantly supported by the evidence.

It is likewise believed that if the unsupported erroneous assertion of the petitioner, that things therein stated are

shown by the undisputed evidence, were eliminated from its petition and brief, that its efforts to get its petition granted would be hopeless.

The petitioner had proceeded as if it were entitled to a review of this case by this court, if it could show that there was evidence sufficient to have justified the jury in finding a verdict in its favor; entirely unmindful of the fact that in these cases, as announced in *Tennant v. Peoria & Pekin Union R. Company, supra:* "* * * courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable."

In the *Tennant case* this court seems to have definitely held that conflicting inferences and presumptions do not authorize the court to say they destroy each other; but it is the province of the jury to decide which, or if either should prevail.

It seems it is now well settled that writ of certiorari will be granted in Federal Employers' Liability cases, only where the basis of fact upon which the State court rested its decision denying the Federal rights, is wholly without any support in the record. That is to say, "It is not the province of this court to weigh conflicting testimony."

Riley having lost his life and being unable to speak, it is presumed that he was entirely free from negligence; that he did everything that a reasonably prudent person would have done; and did nothing such a person would not have done. The petitioner and its foreman owed the ever-pres-

ent duty of not negligently subjecting him to danger. The foreman weakened a stake at the west end of the car, which was the end stake, or became the end stake, by the then standing end stake, being removed after he had weakened this stake; at least, the jury had the right to believe that part of Byles' testimony, in which he said in effect that immediately after sawing that stake, and not removing it, Riley went upon the car and cut the wire; and also had the right to believe the testimony of other witnesses, who said that the foreman Walters preceded Riley in going on the car; for the testimony quite conclusively shows that there were not two—but only one stake there when the wire was cut.

Under such circumstances, the foreman was called upon to speak, and in view of him being kept off of the witness stand by the petitioner, the jury had the right to conclude that he counseled and advised Riley that it was safe for him to cut the wire; if indeed it was not sufficient to justify the jury in concluding that he commanded him to do so.

We treat as unworthy of answer the petitioner's wild, unsupported suggestion that the evidence showed that Riley cut the stakes that gave way.

CONCLUSION

It is believed that petitioner's suggestion that the breaking of the stakes on the North side of the car was unforeseeable, and therefore not a proximate cause of Riley's death, borders on the ridiculous; for inasmuch as it is

certain that those stakes were caused to give way by the stake at the West end breaking, and the pilings spreading at that end, they acted as levers in a mighty shearing movement, causing everything before them to give way.

Petitioner and its foreman, Walters, were charged with knowledge that it would be unsafe and dangerous to weaken the stakes on this car to the extent that they had theretofore weakened the stakes on the much lighter loads that they had unloaded, which fully appears from the testimony. Yet, the testimony supported the jury's finding that they did just that. It is believed that this testimony not only raised the jury question, but that it compelled a jury finding in favor of the respondent, and that the petition for certiorari should be denied, which is respectfully requested.

Respectfully submitted,

S. P. JONES,
FRANKLIN JONES,
C. A. BRIAN,
ERNEST F. SMITH,
Marshall, Texas.
B. F. WHITWORTH,
Linden, Texas,

By .....
Attorneys for Respondent.